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17
18 **UNITED STATES DISTRICT COURT**
19 **CENTRAL DISTRICT OF CALIFORNIA**

| | | |
|--|---|--------------------------------------|
| 20 JESUS X. MIRAMONTES, |) | CASE No.: 2:15-CV-05689-SJO-AFM |
| 21 individually, and as a representatives of |) | |
| 22 the class, |) | MOTION FOR PRELIMINARY |
| |) | APPROVAL |
| 23 |) | |
| 24 Plaintiffs, |) | Judge: Hon. S. James Otero |
| 25 vs. |) | |
| 26 |) | Hearing Date: October 24, 2016 |
| 27 U.S. HEALTHWORKS, INC.; and |) | Time: 10:00 a.m. |
| 28 DOES 1-10 inclusive, |) | Location: Courtroom 1, Spring Street |
| Defendants. |) | |
| |) | |

1 Now come the Plaintiff, by and through counsel hereby move the Court
2 pursuant to Federal Rule of Civil Procedure 23 for preliminary approval of the class
3 settlement, certification of a class for the purposes of settlement, and approval of
4 form and manner of notice. The Plaintiff seeks an Order:

- 5 1) Conditionally certifying a Settlement Class comprised of the Settlement
6 Class Members;
- 7 2) Preliminarily approving the Settlement Agreement and Release;
- 8 3) Approving the proposed Notices of Class Action Settlement;
- 9 4) Certifying Plaintiff Jesus X. Miramontes as Class Representatives;
- 10 5) Appointing Plaintiff's counsel as Class Counsel; and
- 11 6) Appointing a Settlement Administrator;

12 A memorandum in support is attached hereto and incorporated herein.

13 Respectfully submitted.

14 DATED: September 24, 2016

DEVIN H. FOK ESQ.
DHF LAW, P.C.

15
16 By: /s/ Devin H. Fok
17 Devin H. Fok
18 Attorney for Plaintiff
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Jesus X. Miramontes, individually and on behalf of the Settlement Class seeks preliminary approval of the proposed Settlement Agreement with Defendant U.S. Healthworks, Inc. (“Defendant” or “USHW”). Plaintiff alleges various state and federal statutory violations in connection with Defendant’s procurement of employment background check reports¹ and its systematic failure to provide notices in the form and manner that is compliant with the FCRA (Fair Credit Reporting Act, 15 U.S.C. §1681 *et seq*) and the CCRAA (California Consumer Credit Reporting Agencies Act, Civ. C. §1785 *et seq.*).

Specifically, Defendant failed to provide a stand-alone disclosure consisting solely of the disclosure that “a consumer report will be procured for employment purposes” in violation of 15 U.S.C. §1681b(b)(2)(A)(i). Defendant also failed to provide consumers with a copy of their report and a reasonable opportunity to dispute the information *before* taking adverse action in whole or in part of the basis of the report. 15 U.S.C. §1681b(b)(3)(A).

Moreover, Defendant procured not only criminal history reports but also employment credit reports. In California, this practice was made illegal on January 1, 2012 under Lab. C. §1024.5. Although there are some limited exceptions, Plaintiff alleges that none of the positions offered by Defendant during the relevant class period fell within one of these enumerated categories. *See* Lab. C. §1024.5(a)(1)-(8).

Moreover, even if Defendant can successfully argue that all of the employment credit reports it procured during the relevant class period fell within the exceptions, it

¹ They are defined as “consumer reports” within the meaning of the Fair Credit Reporting Act (“FCRA” 15 U.S.C. §1681 *et seq.*). *See* Definition at 15 U.S.C. §1681a(d).

1 violated the CCRAA by failing to provide the required disclosure prior to procuring
2 said credit reports. *See* Civ. C. §1785.20.5.

3 During the relevant time period, Defendant utilized a single vendor, ADP, Inc.
4 to procure employment background check reports and furnish notices to job
5 applicants. ADP, Inc. used the same notices and procurement procedures for all of
6 Defendant's job applicants. Plaintiff has discovered no variations in its practices with
7 respect to individual job applicants. Accordingly, Plaintiff believes that this action is
8 suitable for class settlement.

9 The Settlement Agreement between Plaintiff and Defendant (collectively, the
10 "parties"), if approved, will resolve all claims of the Plaintiffs and all members of the
11 class in exchange for Defendant's agreement to pay \$400,000 into a common
12 settlement fund. Declaration of Devin H. Fok ("Fok Decl.") Ex. 1, Stipulation and
13 Settlement of Class Action Claims ("SA"), P.3, ¶I.1.13. The settlement is a ***claims-***
14 ***paid*** process involving no reversion. SA, P. 7, ¶II.K. The class size is approximately
15 4,381 members. SA, P. 15, ¶IX.9.1 However, in the event that the class size exceeds
16 4,500, Plaintiff will have the option to terminate the settlement. SA, P.23, ¶XI.11.2.

17 The identity of the class members are ascertainable and have been identified by
18 Defendant. The proposed settlement of this action is the product of hard-fought and
19 lengthy arm's-length negotiations by experienced and informed counsel, and warrants
20 preliminary approval, as the terms are "fair, reasonable, and adequate." Fed. R. Civ.
21 P. 23(e)(2).

22 23 **II. PLAINTIFF'S CLAIMS**

24
25 On June 5, 2014 Plaintiff was extended a written offer of employment by
26 Defendant to work as a medical assistant. Fok Decl., Ex. 2. On June 10, 2014,
27 Defendant procured an employment background check report containing information
28

1 related to his credit and criminal history². Fok Decl., Ex. 3. The report disclosed
2 various pieces of adverse credit and criminal history information. Based on the
3 information disclosed in the report, Defendant rescinded its job offer.

4 However, Defendant never provided Plaintiff with a copy of his consumer
5 report before the revocation of his employment offer. It was not until after his
6 attorneys made a formal request did Plaintiff ultimately receive a copy of his
7 consumer report. Plaintiff alleges that a medical assistant position does not fall within
8 any of the enumerated positions for which a credit report may be procured. *See* Lab.
9 C. §1024.5(a)(1)-(8). Moreover, even if Defendant could have legally procured
10 Plaintiff's consumer report, Defendant failed to provide the specific statutory basis
11 for the procurement of the same as required under Civ. C. §1785.20.5.

12 13 **III. THE LITIGATION AND SETTLEMENT OF THE ACTION**

14 15 **A. Federal FCRA Claims**

16
17 Under the FCRA, employers can freely procure and use employment
18 background check reports provided that they follow two strict procedural
19 requirements. First, the consumer must be notified by clear, conspicuous, and stand-
20 alone disclosure informing the applicant that a consumer report for employment
21 purposes will be procured. 15 U.S.C. §1681b(b)(2). Plaintiff alleges that Defendant's
22 disclosures were neither, clear, nor stand-alone as they contained extraneous
23 information and were made as part of the employment application. *See* Fok Decl., Ex.
24 4., P.3-7; *Milbourne v. JRK Residential Am. LLC*, 92 F. Supp. 3d 425, 433. (E.D. Va.
25 2015) (the notices must contain only the mandated disclosures and nothing else);

26
27 ² Plaintiff was previously convicted of driving without a license and vandalism. Both
28 convictions occurred during Plaintiff's early twenties and they have been expunged
or dismissed pursuant to California Penal Code §1023.4 following the his application
with Defendant.

1 *Woods v. Caremark PHC, L.L.C.*, 2015 WL 6742124, at *2 (W.D. Mo. 2015)
2 (finding disclosure to violate the FCRA when it contained an overbroad authorization
3 and state-specific notices).

4 Moreover, whenever adverse action is contemplated in whole or in part on the
5 basis of information disclosed in a consumer report, the employer must provide the
6 consumer with a copy of his report and a notice of rights under the FCRA that is
7 compliant with 15 U.S.C. §1681b(b)(3)(A). The notice mandated under this
8 requirement is commonly referred to as “pre-adverse action notice.” The idea behind
9 this notice is to allow the consumer an opportunity to review and dispute information
10 in his/her consumer report before the employment opportunity is lost. *See Reardon v.*
11 *ClosetMaid*, 2013 U.S.Dist.LEXIS 169821, *43 (W.D. Pa. Dec. 2, 2013) (“*Reardon*”)
12 citing H.R. Rep. 103-486 at 40 (1994). Here, Defendant failed to provide Plaintiff
13 with a copy of his report prior to the revocation of his employment offer. It was not
14 until Plaintiff’s counsel made a formal request for the information was a copy of the
15 report ultimately provided to Plaintiff. No opportunity was given to Plaintiff to
16 dispute the information in his consumer report.

17 Remedies for violation of the FCRA is specified under 15 U.S.C. §§1681n and
18 o. Statutory penalties of \$100 to \$1,000 is authorized for each willful and/or reckless
19 violation of any provisions of the FCRA. 15 U.S.C. §1681n(a)(1)(A). The aggrieved
20 consumer may also recover actual damages, if any for the same.

21 22 **B. California CCRRA and Labor Code Claims**

23
24 In 2011, AB22 was introduced to amend Lab. C. §1024.5 and add Cal. Civ. C.
25 §1785.20.5 to the CCRAA with the intent to generally prohibit the use of consumer
26 credit reports for employment purposes. The California legislature found that “a
27 person’s credit score says nothing about his or her character or ability to do a job
28 effectively and responsibly.” AB22, September 1, 2011, P. 3. The law became

1 effective on January 1, 2013. However, a consumer credit report was nevertheless
2 procured on Plaintiff.

3 Under Lab. C. §1024.5(a)(1)-(8), there are several exceptions to the prohibition
4 against procurement of credit reports. These exceptions relate to employment
5 positions within financial institutions and positions where the applicant has access to
6 sensitive consumer financial information. None of these exceptions apply to
7 Plaintiff's position of a medical assistant.

8 Moreover, even where a position falls within the enumerated exception, the a
9 notice compliant with Civ. C. §1785.20.5 (specifying the applicable exception) must
10 be provided to the consumer *before* a credit report may be procured. Plaintiff alleges
11 that Defendant categorically failed to provide such notice to any California job
12 applicants for whom Defendant procured a credit report. Accordingly, Plaintiff
13 believes that this action is suitable for class determination.

14 Violation Lab. C. §1024.5 may be enforced through the PAGA, with one a
15 one-year limitations period. Code of Civ. Pro. §340(a). A civil penalty of \$100 per
16 violation is authorized for each aggrieved employee. Lab. C. §2699(f)(2). The
17 CCRAA has a 2-year statute of limitations. Civ. C. 1785.33. It authorizes consumers
18 to recover \$100-\$2,500 in civil penalties for willful and/or reckless violations as well
19 as actual damages.

20 21 **C. Settlement Class**

22
23 The settlement class involves four subclasses. A settlement class member may
24 belong to one or all of these subclasses and his or her recovery will be increased as
25 further discussed below:

- 26 • ***FCRA Disclosure Subclass*** (15 U.S.C. §1681b(b)(2)(A)(i)) – All
27 individuals who: (1) applied for employment with Defendant between
28 July 27, 2013 to October 24, 2016 or the date the Court grants

preliminary approval, whichever is later; (2) executed a disclosure and authorization form substantially identical to that executed by Plaintiff; and (3) had a “consumer report” prepared within the meaning of the FCRA, which was procured by Defendant.

- ***FCRA Notice Subclass*** (15 U.S.C. §1681b(b)(3)(A)(i)) – All FCRA Disclosure Class Members who: (1) had their employment offers rescinded due to a consumer report procured by Defendant; and (2) allegedly did not receive a pre-adverse action notice before the employment offers were rescinded.
- ***CCRAA Subclass*** (Civ. C. §1785.20.5) – All FCRA Disclosure Class Members who: (1) had a “consumer credit report” prepared on them within the meaning of the CCRAA, which was procured by Defendant; and (2) resided in California at the time the consumer credit report was procured by Defendant.
- ***PAGA Subclass*** (Lab. C. §1024.5) – All FCRA Disclosure Class Members who: (1) applied for employment with USHW on or after June 24, 2014; (2) executed a disclosure and authorization form substantially identical to that executed by Plaintiff; (3) had a “consumer credit report” prepared on them within the meaning of the CCRAA, which was procured by Defendant; and (5) applied for positions which may not have fallen within one of the eight (8) categories enumerated in California Labor Code §1024.5.

SA, P. 5, ¶I.1.27.

D. Discovery

Prior to the mediation on May 17, 2016, Plaintiff served on Defendant an extensive informal discovery requests. In response, Defendant produced a class list

1 detailing all consumers (name withheld, but uniquely identified through a consumer
2 report order ID number) for whom they procured a consumer report.

3 As of May 17, 2016, Defendant procured 3,382 consumer reports. Of those, 33
4 (.975%) failed their background checks or were not hired. This included 502
5 (14.84%) California applicants on whom Defendant procured a credit report. Plaintiff
6 obtained the job title and descriptions of these 502 applicants and determined that
7 none of them fell within the exceptions enumerated under Lab. C. 1024.5(a)(1)-(8).
8 Of the 502 California job applicants, 375 fell within the 1-year Private Attorney
9 General's Act's ("PAGA" Lab. C. §2699 *et seq.*) statute of limitations period. Code
10 of Civ. Pro. §340(a). The balance fell outside of the 1-year period and is nevertheless
11 entitled to recovery under CCRAA's 2-year statute of limitations. Civ. C. 1785.33.
12 Since the mediation, the class size has since increased to 4,381 members. The parties
13 anticipate that the class size will not exceed 4,500 by the date of the preliminary
14 approval.

15 16 **E. The Payment Structure**

17
18 The settlement proceeds will be distributed based on a point system. *See* SA,
19 P.18-19, ¶IX.9.6.1. **One (1) point** is assigned to every member of the FCRA
20 Disclosure Subclass who did not receive the FCRA mandated disclosure in the form
21 mandated under 15 U.S.C. §1681b(b)(2). Every class member will belong to this
22 class as they have all signed identical forms before being subject to employment
23 background check reports.

24 **Ten (10) points** is assigned to every member of the FCRA Notice SubClass
25 who did not receive a copy of the report and a reasonable opportunity to dispute the
26 information before their employment offers were revoked.

27 **Five (5) points** is assigned to every member of the CCRAA subclass and **one**
28 **(1) point** is assigned to every member of the PAGA SubClass.

1 Based on the parties' calculation, this translates to approximately \$40 per point
2 based on a class size of 4,381 and before any deductions.

3
4 **F. PAGA Payment**

5
6 Pursuant to the PAGA, the parties agree to allocate, conditioned upon this
7 court's approval, \$37,500 as penalties to the Labor and Workforce Development
8 Agency ("LWDA"). Lab. C. §2699(e). This amount is based on the pre-mediation
9 discovery of 375 applicant who fall within this 1-year PAGA class multiplied by the
10 statutory penalty of \$100 per applicant. Lab. C. §2699(f)(2).

11
12 **G. Notice and Opt-Out**

13
14 Within 15 days after preliminary approval, Defendant will furnish to the third-
15 party settlement administrator a class list including the name, most current mailing
16 address, telephone number, and social security number (to the extent available to
17 Defendant). SA, P. 10-11, ¶VI.6.1.1. Defendant will also provide the class
18 membership of each subclass that each of the settlement class members belongs to.
19 *Id.*

20 The address information will be verified by the settlement administrator using
21 the USPS National Change of Address database. SA, P. 11, ¶VI.6.1.2. Skip-tracing of
22 the social security number of the class member will be used if no known or valid
23 mailing address is found. *Id.*

24 Mail notice will be sent 30-days following preliminary approval via first class
25 U.S. mail, postage prepaid. The proposed notice is attached as Exhibit 1 of the class
26 settlement agreement.

Any settlement class members may opt-out prior to the opt-out deadline defined as 45-days after the mailing of the settlement notice or 75-days after the date of preliminary approval. *See* SA, P.4, ¶I.1.19.

H. Attorney's Fees and Expenses and a Service Award to the Class Representative

The Settlement Agreement provides that Class Counsel may move for the Court to award attorney's fees, costs and expenses to be paid from the Gross Settlement Fund. The Fees Award is in an amount not to exceed 33 and 1/3% of the Settlement Fund or \$133,333.33. SA, P. 15, ¶IV.9.2. This amount is less than the Plaintiff's counsel's current lodestar.

Class Counsel may also petition this Court on behalf of the named Plaintiff an incentive award in an amount not to exceed \$5,000.00. SA, P. 17, ¶IV.9.3.3.

I. Cy Pres Recipient

The parties have designated Center for Employment Opportunities ("CEO") as the *cy pres* recipient. The CEO is a nationwide non-profit organization that is dedicated to assisting job applicants with a conviction to find jobs. *See* <http://ceoworks.org/about/what-we-do/mission-vision/>, last viewed September 24, 2016.

IV. THE SETTLEMENT CLASS SHOULD BE CERTIFIED

Rule 23 allows courts to conditionally or provisionally certify a class for purposes of effectuating a settlement. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 793-94 (3rd Cir. 1995); *White v.*

1 *Experian Info. Solutions, Inc.*, 803 F. Supp.2d 1086, 1094 (C.D. Cal. 2011) (“Where,
2 as here, ‘the parties reach a settlement agreement prior to class certification, courts
3 must peruse the proposed compromise to ratify both the propriety of the certification
4 and the fairness of the settlement.’”). To certify a class, the court must find that the
5 prerequisites of Rule 23(a) are met, and that the case falls within at least one of the
6 categories listed in Rule 23(b). *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th
7 Cir. 1998); *Legge v. Nextel Communications, Inc.*, CV 02-8676-DSF (VNKX), 2004
8 WL 5235587, *1 (C.D. Cal. June 25, 2004). The same standards generally apply
9 where certification is sought for settlement purposes only, although issues of
10 manageability at trial are not relevant. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591,
11 620 (1997). Both Rule 23(a) and Rule 23(b) are satisfied here.

12 13 **A. Rule 23(a) Requirements**

14
15 Under Rule 23(a), one or more persons may sue as representative parties on
16 behalf of a class if: 1) the class is so numerous that joinder of all members is
17 impracticable; 2) there are questions of law or fact common to the class; 3) the claims
18 or defenses of the representative parties are typical of the claims or defenses of the
19 class; and 4) the representative parties will fairly and adequately protect the interests
20 of the class. Fed. R. Civ. P. 23(a).

21 22 **a. Numerosity**

23
24 A class action can only be maintained where “the class is so numerous that
25 joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1); *Legge*, 2004 WL
26 5235587 at *4. But “[t]here is no absolute number at which joinder becomes
27 impracticable. *Legge*, 2004 WL 5235587 at *4 (citing *Gen. Tel. Co. v. EEOC*, 446
28 U.S. 318, 330, 100 S. Ct. 1698, 64 L.Ed.2d 319 (1980)). Generally, a class size of

1 approximately 40 members has been held to meet the numerosity requirement. *See,*
2 *e.g., Jordan v. Los Angeles County*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated and*
3 *rem'd on other grounds*, 459 U.S. 810 (1982) (“we would be inclined to find the
4 numerosity requirement in the present case satisfied solely on the basis of the number
5 of ascertained class members, *i.e.*, 39, 64 and 71”); *Ashmus v. Calderon*, 935 F.Supp.
6 1048, 1064 (N.D. Cal. 1996) (certifying a class of 52 members). Since there are 4,381
7 class members, the numerosity requirement is easily met.

8
9 **b. Commonality**

10
11 Under Rule 23(a)(2), a class must have sufficient commonality, which
12 “requires the plaintiff to demonstrate that the class members have suffered the same
13 injury.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551, 180 L.Ed. 2d 374
14 (2011) (quotation omitted). This requirement is construed “permissively.” *Legge*,
15 2004 WL 5235587 at *5 (citing *Hanlon*, 150 F.3d at 1019). Commonality is
16 evaluated as to whether the complaint truly “is capable of classwide resolution –
17 which means that determination of its truth or falsity will resolve an issue that is
18 central to the validity of each one of the claims in one stroke.” *Dukes*, 131 S.Ct. at
19 2551.

20 “[C]ommonality is often found in consumer fraud and related actions where
21 standardized documents and procedures are used. This is true for violations of FCRA
22 and ECOA.” *Legge*, 2004 WL 5235587 at *5 (citing *Clark v. Experian Info.*
23 *Solutions, Inc.*, 2002 U.S.Dist.LEXIS 20410, *11 (D.S.C. June 26, 2002) common
24 questions predominate in FCRA action, including whether a “particular practice or
25 policy of writing credit reports” was reasonable.)). Here, every Class member’s claim
26 stems from Defendant’s alleged failure to provide them with disclosures and the
27 procurement of credit report on California consumers. The notices provided to each
28 individual applicant did not vary between applicant to applicant and Defendant

1 uniformly failed to provide any notice under the CCRAA to any of its California
2 applicants prior to procuring employment credit reports.

3 Commonality has been found in similar cases including claims for failure to
4 provide pre-adverse action notice. *Reardon v. Closetmaid Corp.*, 2011
5 U.S.Dist.LEXIS 45373, at *14 (“Here, there are numerous questions of law or fact
6 common to the class. These include, but are not limited to....whether [defendant]
7 relied on derogatory information in consumer reports to deny employment to the sub-
8 class members in violation of the FCRA...”); *Singleton*, 976 F.Supp.2d at 675
9 (finding common question of “whether [defendant] violated the FCRA by failing to
10 provide employees with copies of their consumer reports and pre-adverse action
11 notice”). *See also Megallon, Megallon v. Robert Half Int’l, Inc.*, 2015
12 U.S.Dist.LEXIS 153584 (D.Or. 2015) (certifying a class action based on identical
13 claims raised in this litigation); *Thomas v. FTS USA, LLC*, 2016 U.S.Dist.LEXIS
14 2055 (E.D. Va. 2016); *Milbourne v. JRK Residential Am., LLC*, 2014 U.S. Dist.
15 LEXIS 155288 (E.D. Va. 2014); *Manuel v. Wells Fargo Bank, N.A.*, 2015 U.S.
16 Dist.LEXIS 109780 (E.D. Va. 2015).

17
18 **c. Typicality**
19

20 For similar reasons, Named Plaintiff’s representative claim satisfies the
21 typicality requirement of Rule 23(a)(3). Typicality and commonality are similar and
22 tend to merge. *Gen. Tel. Co. of Sw v. Falcon*, 457 U.S. 147, 157 n.13 (1982). “Under
23 the rule’s permissive standards, representative claims are ‘typical’ if they are
24 reasonably co-extensive with those of absent class members; they need not be
25 substantially identical.” *Hanlon*, 150 F.3d at 1020; *accord Legge*, 2004 WL 5235587
26 at *8 (“As a result of the uniformity with which [Defendant] treated its customers, the
27 Plaintiffs’ experiences and claims in some ways are typical of those of the class.”). In
28

1 the instant case, Plaintiff contends that each class member suffered the same harm.
2 Accordingly, Plaintiff's claims are typical of the proposed class.

3
4 **d. Adequacy of Representation**

5
6 To make a determination on adequacy, the Court must evaluate both the
7 Named Plaintiffs and their counsel:

8
9 Resolution of two questions determines legal adequacy: 1) do the named
10 plaintiffs and their counsel have any conflicts of interests with other
11 class members and 2) will the named plaintiffs and their counsel
prosecute the action vigorously on behalf of the class?

12 *Hanlon*, 150 F.3d at 1020.

13 All factors support certification here. There is no conflict of interest that would
14 prevent Named Plaintiff or Class Counsel from representing the proposed Class, and
15 Named Plaintiff and Class Counsel have vigorously pursued the Class's claims. Class
16 Counsel are experienced class-action litigators who have successfully represented the
17 Named Plaintiff and putative class in this litigation and settlement negotiations.
18 Information about the qualifications DHF Law, P.C., and A New Way of Life
19 Reentry Project are included in the declarations of Devin H. Fok, and Joshua E. Kim
20 respectively.

21
22 **B. Rule 23(b)(3) Requirements**

23
24 The Settlement contemplates provisional class certification under Rule
25 23(b)(3). If the elements of Rule 23(a) are satisfied, then a class action may be
26 certified provided the court finds that certain other requirements under Rule 23(b)(3)
27 are met: 1) questions of law or fact common to class members predominate over any
28 questions affecting only individual members, and 2) a class action is superior to other

1 available methods for fairly and efficiently adjudicating the controversy. Fed. R.Civ.
2 P. 23(b)(3); *Hanlon*, 150 F.3d at 1022.

3 The “predominance inquiry tests whether proposed classes are sufficiently
4 cohesive to warrant adjudication by representation.” *Amchem Prods.*, 521 U.S. at
5 623. Predominance is similar to, but “far more demanding” than the commonality
6 requirement. *Id.* at 623-24. The predominance requirement is satisfied because
7 common questions present a “significant portion of the case” that can be resolved for
8 all Class members in a single adjudication. *See Gutierrez v. Wells Fargo Bank, N.A.*,
9 2008 W.L. 4279550, *14 (N.D. Cal. Sept. 11, 2008) (citing *Hanlon*, 150F.3d at 1019-
10 22). As discussed in the commonality and typicality sections above, the most central
11 issue in this litigation is common among all the prospective Class members and the
12 Named Plaintiff. Moreover, it is Plaintiff’s contention that the elements of these
13 nearly identical claims could be shown at trial through common evidence regarding
14 Defendant’s alleged policies, procedures and practices for sending FCRA and
15 CCRAA notices.

16 Additionally, adjudicating the facts presented in this action on a class-wide
17 basis would be superior to alternative methods of adjudication. “The superiority
18 requirement is generally satisfied where there are ‘multiple claims for relatively small
19 individual sums.’” *Legge*, 2004 WL 5235587 at *12 (quoting *Local Joint Exec. Bd.*
20 *Of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163
21 (9th Cir. 2001)). This is because “[w]ithout a class action, the costs of individual
22 litigation as compared to the amount of damages may be prohibitively high,” or “the
23 individual plaintiffs’ claims are so small that denying class certification would
24 effectively preclude any recovery.” *Id.* (recognizing that a class action may not only
25 be the superior method of adjudication of multiple claims with small damages, but
26 may be the only realistic means for class members to adjudicate their claims).

27 The interests of the Class would not be better served by prosecuting their
28 claims individually. *See* Fed. R. Civ. P. 23(b)(3)(A)-(B). Indeed, a class action is only

feasible means by which individual applicants can effectively challenge Defendant's conduct, given the relatively modest size of individual claims under the FCRA, which provides for statutory damages of only \$100-1,000 per violation³, and the vastly superior resources with which Defendant has to defend itself. It is therefore desirable to litigate the issues in this forum on a class-wide basis. *See id.*, at 23(b)(3)(C).

C. The Proposed Settlement More Than Satisfies the Standard for Preliminary Approval

The proposed Settlement Agreement in this case, which provides for a non-reversionary monetary recovery of \$400,000 more than meets the standard for preliminary approval. On a per-class member basis, this settlement is commensurate with settlement of similar FCRA claims. *See Barel v. Bank of Am.*, 255 F.R.D. 393, 402 (E.D. Pa. 2009) ("The proposed settlement confers \$51.96 of value on each class member, which amounts to...52% of the low end of the damages range and 5.2% of

³ While the FCRA does provide for recovery of actual damages, 15 U.S.C. §1681o(a) (actual damages for negligent FCRA violation) and 1681n(a) (actual damages for willful FCRA violation), such damages may only be sought where the damage is result of the violation at issue. *See Caltabiano v. BSB Bank & Trust Co.*, 387 F.Supp.2d 135 (E.D.N.Y. 2005) (debtor suing credit agencies unable to recover actual damages where loan-rate increase was based on market rate rather than credit report). Class members who perceive they have actual damages as a result of failing to receive pre-adverse action notice may opt-out of the Settlement. This ability to opt-out has been held to sufficiently protect those class members in similar cases. *See Egge v. Healthspan Services Co.*, 208 F.R.D. 265, 272 (D. Minn. 2002) ("[defendant's] alleged concern that individual class members may be able to recover more in individual actions is adequately addressed by use of the Rule 23(b)(3) opt-out procedure.") (quotation omitted); *Macarz v. Transworld Systems, Inc.*, 193 F.R.D.46, 55 (D. Conn. 2000); *Weber v. Goodman*, 9 F.Supp.2d 163,170, 171 (E.D.N.Y. 1998) (deciding a class action in an FDCPA case where individual claims could hve resulted in recoveries of \$1,000 per individual was superior even though the class members would receive no more than \$2 in statutory damages for the defendant's FDCPA violation).

the high end of the damages range”); *Singleton v. Domino’s Pizza, LLC*, 976 F.Supp.2d 665 (D. Md. 2013) (\$2.5 million FCRA settlement for a claim-in class of 45,668 potential class members); *Hunter v. First Transit, Inc.*, 09-cv-6178 * 10-cv-7002 (N.D. Ill. Mar. 23, 2011) (\$5.9 million FCRA settlement for more than 143,000 class members); *Brown et al. v. Lowe’s Companies, Inc., et al.*, 5:13-cv-00079-RLV-DSC (W.D. N.C. 2016) (FCRA settlement, \$35 cash or \$50 gift card per class member); *Johnson v. Midwest Logistics Sys.*, 2013 U.S.Dist.LEXIS 74201 (S.D. Oh. 2013) (\$452,380 common fund with \$260 for each consumer who has been subject to an adverse consumer report; and \$1,000 for each consumer who has been subject to an adverse consumer report; and was not hired); *Cf Harris v. U.S. Physical Therapy, Inc.*, 2012 U.S.Dist.LEXIS 111844 (D.Nv. 2012) (\$1,000 each class member for 47-members of the proposed pre-adverse action notice class); *Townsend v. AIM Integrated Logistics, Inc.*, 4:15-cv-00493-KBB (N.D. Oh. 2015) (automatic payment of \$1,000 for 206 class members who were not provided pre-adverse action notice); *Reardon v. ClosetMaid*, 2:08-cv-01730-MRH, 2013 U.S.Dist.LEXIS 169821 (W.D. Pa. 2013) (\$400 to approximately 50 pre-adverse action notice class members after the court granted class certification as to these members).

Plaintiff is not aware of any similar PAGA and/or CCRAA settlements of similar as the statute was enacted relatively recently, the above FCRA cases with similar statutory penalty provisions demonstrate that the settlement amount reached in this action is well within what courts have found to be fair and reasonable.

a. The Settlement Is the Product of Serious, Informed, Non-Collusive Negotiations

As recounted above, the settlement in this case was reached only after extensive formal discovery and after the filing of a formal motion for class certification. This is clear indicia that the settlement was the result of an arm’s length

1 negotiation. "An "initial presumption of fairness is usually involved if the settlement
2 is recommended by class counsel after arm's-length bargaining." *Riker v. Gibbons*,
3 2010 WL 4366012, at *2 (D. Nev. Oct. 28, 2010); *see also Hanlon*, 150 F.3d at 1027
4 (affirming approval of settlement after finding "no evidence to suggest that the
5 settlement was negotiated in haste or in the absence of information illuminating the
6 value of plaintiff's claims.").

7
8 **b. The Settlement Is Adequate and Reasonable**

9
10 While the exact amount that each class member will recover is unknown until
11 all checks have been cashed, the gross settlement amount of \$400,000 is substantial.

12 For a vast majority of the consumers, the compensation is fair for any and
13 alleged harm that they have suffered due to not receiving notice in the method and
14 manner mandated by the FCRA. The settlement also fairly and adequately
15 compensates California class members who have been subject to credit reports. As
16 fully set forth above, less than 1% of the applicants (33 of 3,382) were denied
17 employment for due to information in their employment background check reports,
18 this means that 99% of the applicants did not suffer any actual damages outside of the
19 statutory penalties authorized under the respective statutes.

20 Moreover, the statutory penalty of \$100 to \$1,000 for the FCRA and \$100 to
21 \$2,500 for the CCRAA is available only if Plaintiff can establish willful violation. 15
22 U.S.C. §1681n(a)(1)(A); Civ. C. §1785.31(a)(2)(B). If the Defendant's violation was
23 at most negligent, recovery is limited to actual damages. *See* 15 U.S.C. §1681o(a)(1);
24 Civ. C. §1785.31(a)(1).

25 Viewed in the context of the litigation risks faced, as well as the substantial
26 delay, and costs that class members would have experienced in order to receive
27 proceeds from an adversarially-obtained judgment, not to mention the judicial
28

resources required, this settlement is in the best interests of the Plaintiff and the Settlement Class members, and should be approved.

D. The Court Should Approve Dissemination of the Proposed Class Notice

With this motion, Plaintiffs have provided two forms of proposed class notice—the short notice to be mailed and the long form notice to be made available on the settlement website and upon request. Fok Decl., SA, Ex. 1 and 2. These proposed notices include all of the information required by Fed. R. Civ. P. 23(c)(2)(B). The Long Form Notice contains details about the definition of the Class, the proposed Class Counsel, the size of the settlement fund, the methodology for opting out of or objecting to the settlement, the potential size of Plaintiff's request for attorney's fees, expenses, and class representative incentive awards, and the date and location of the final approval hearing. This notice program exceeds the requirements of Fed. R. Civ. P. 23, and should be approved.

V. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request this Court to grant approval to the proposed settlement.

DATED: September 24, 2016

DHF LAW, P.C.

By: /s/ Devin H. Fok
Devin H. Fok
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E-FILING ATTESTATION

By his signature below, counsel for Plaintiff attests that he has on file all holographic signatures corresponding to any signatures indicated by a conformed signature (/s/) within this e-filed document and any document e-filed concurrently herewith.

DATED: September 24, 2016

DHF LAW, P.C.

By: /s/ Devin H. Fok

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